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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Petitioner,

v.

HON. CLARK W. MUNGER, Judge of the Superior Court of the State of Arizona, in and for the County of Pima,

Respondent,

and

ABIGAIL ALETA ALLIN,

Real Party in Interest.

2 CA-SA 2012-0034
DEPARTMENT A

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20111856001

JURISDICTION ACCEPTED; RELIEF GRANTED

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E C K E R S T R O M, Presiding Judge.

¶1 The State of Arizona petitions this court for special action review of the respondent judge's order reinstating a plea offer the state previously had withdrawn. Because the state has no remedy by appeal, we accept jurisdiction. *See* Ariz. R. P. Spec. Actions 1(a); A.R.S. § 13-4032. For the reasons that follow, we grant relief.

¶2 In June 2011, the state charged real party in interest Abigail Allin with leaving the scene of an accident causing serious physical injury, tampering with physical evidence, and criminal damage. The state offered Allin a plea agreement, which Allin had indicated she would accept, pursuant to which she would plead guilty to leaving the scene of an accident. That agreement acknowledged the state had made "reasonable efforts . . . to confer with the victims(s) where required [and] . . . to give the victims(s) notice of this plea, the right to be present and an opportunity to be heard." Although a change-of-plea hearing had been set, the state withdrew the offered plea before that hearing occurred. At a subsequent settlement conference, the state confirmed that it had "consult[ed] with the victim representative" before extending the plea offer but had withdrawn the plea after receiving "new victim input" from the victim's parent and that "[t]here is not a plea agreement that [the state is] considering offering."

¶3 Allin moved to dismiss the indictment or reinstate the plea agreement, arguing the state had violated her due process rights by withdrawing the plea because the "wishes of [the victim]'s family [were] the deciding factor in [the state's] decision to revoke." At a hearing on that motion, the state agreed it knew Allin had indicated she would accept the plea before the state withdrew it, but that after speaking with the victim's father and after the victim's father had contacted the media, the state withdrew

the plea upon "consider[ing]" the family's feelings. However, the respondent judge concluded the plea offer "was not withdrawn because of input from the victim's family," but instead "because the press got involved with the case." Concluding that the state's withdrawal of the plea offer on that basis "violat[ed the] constitution," the respondent ordered that the offer be reinstated. This special action followed.

¶4 A defendant has no right to a plea agreement, *State v. Martin*, 139 Ariz. 466, 481, 679 P.2d 489, 504 (1984), and the decision whether to offer a plea is solely within the prosecutor's discretion. *See Rivera-Longoria v. Slayton*, 228 Ariz. 156, ¶ 13, 264 P.3d 866, 869 (2011). "A plea bargain standing alone is without constitutional significance," and, until the defendant actually pleads guilty, it "does not deprive an accused of liberty or any other constitutionally protected interest." *Mabry v. Johnson*, 467 U.S. 504, 507 (1984), *abrogated on other grounds by Puckett v. United States*, 556 U.S. 129 (2009). And, even if a plea is offered by the state and accepted by a defendant, Rule 17.4(b), Ariz. R. Crim. P., permits either party to withdraw that plea "prior to its acceptance by the court." *See, e.g.*, *State v. Superior Court (Reinhart)*, 160 Ariz. 71, 72, 770 P.2d 375, 375-76 (App. 1988) (Rule 17.4(b) permitted state to withdraw negotiated plea when plea included case assigned to different prosecutor).

¶5 That right, however, is not unqualified. This court has suggested that a defendant who has relied detrimentally on a plea before its acceptance by the trial court might be entitled to specific performance of that plea agreement by the state. *Reinhart*, 160 Ariz. at 72, 770 P.2d at 376. And Division One of this court observed in *State v. Donald* that a trial court could "intervene to reinstate a plea offer that the State has

withdrawn for vindictive reasons." 198 Ariz. 406, ¶ 39, 10 P.3d 1193, 1204 (App. 2000); *see Martin*, 139 Ariz. at 481, 679 P.2d at 504 (because prosecution must not be "'tainted with invidious discrimination,'" "county attorney may not refuse to plea bargain out of animus toward the defendant's attorney"), *quoting Murgia v. Municipal Court*, 540 P.2d 44, 47 (Cal. 1975).

¶6 But Allin did not argue, and the respondent judge did not find, that the state's decision to withdraw the plea was vindictive or discriminatory, nor that Allin had relied on the state's plea offer to her detriment.[1] Instead, the respondent determined the state's withdrawal of the plea occurred exclusively because of the news media's interest in the case. And, it concluded that withdrawal of a plea on that basis was not "constitutional," without expressly identifying the constitutional basis for that conclusion. In her motion seeking dismissal of the indictment or reinstatement of the plea, Allin suggested that "pressure" placed on the state by the victim's family "via the media" supported her claim that the state's decision to withdraw the plea violated her due process rights.

[1]At oral argument before this court, Allin argued for the first time and without citation to authority that the state had acted in "bad faith" by withdrawing the plea due to media attention on the case, thereby implicating Allin's due process rights to a fair process. Because this argument was not raised below and was raised on review for the first time at oral argument, we do not address it further. *See State v. Murdaugh*, 209 Ariz. 19, ¶ 29, 97 P.3d 844, 851 (2004); *Sobol v. Marsh*, 212 Ariz. 301, ¶ 7, 130 P.3d 1000, 1002 (App. 2006).

¶7 Assuming the respondent judge's decision similarly was grounded in due process concerns,[2] "'the denial of due process is a denial of fundamental fairness, shocking to the universal sense of justice.'" *Oshrin v. Coulter*, 142 Ariz. 109, 111, 688 P.2d 1001, 1003 (1984), *quoting Crouch v. Justice of Peace Court*, 7 Ariz. App. 460, 465-66, 440 P.2d 1000, 1005-06 (1968). But we have found no authority, and Allin has cited none, suggesting that a prosecutor's decision to withdraw a plea offer due to potential media coverage violates due process.

¶8 Nor has Allin provided us with any reasoned basis to adopt such a rule. A prosecutor has the duty of representing the interests of the state in criminal prosecutions, in doing so, he or she

> "speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of 'The People' includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name."

State ex rel. Romley v. Superior Court, 181 Ariz. 378, 382, 891 P.2d 246, 250 (App. 1995), *quoting Lindsey v. State*, 725 P.2d 649, 660 (Wyo. 1986). For that reason, and especially when the chief prosecutor is an elected official, a prosecutor must be accountable to the state's citizenry. *Cf. Town of Newton v. Rumery*, 480 U.S. 386, 399-400 (1987) (O'Connor, J., concurring) (recognizing "public interest" factor in charging decisions). Charging decisions, and therefore decisions whether to withdraw a plea offer,

[2]We have not identified, nor has Allin, any other potential constitutional basis for the respondent judge's determination.

"are discretionary public duties that are enforced by public opinion, policy, and the ballot." *Doe v. Mayor and City Council*, 745 F. Supp. 1137, 1139 (D. Md. 1990). The United States Supreme Court has acknowledged the power of the media to "inform the American people and shape public opinion." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 250 (1974). And the fact prosecutors necessarily balance several interests, even competing interests, in making charging decisions does not violate due process. *Cf. Villapondo v. Reagan*, 211 Ariz. 305, ¶¶ 7-8, 121 P.3d 172, 174-75 (App. 2005) (prosecutor's conflict of interest does not violate due process unless conflict sufficiently severe to deprive defendant of fundamental fairness).

¶9 In light of the prosecutor's duty to consider the public interest in charging decisions, and the media's power to drive and reflect public opinion, we find no basis to conclude a prosecutor denies "'fundamental fairness, shocking to the universal sense of justice,'" by permitting potential media attention to influence the decision whether to offer or withdraw a plea.[3] *Oshrin*, 142 Ariz. at 111, 688 P.2d at 1003, *quoting Crouch*, 7 Ariz. App. at 465-66, 440 P.2d at 1005-06.

¶10 In her response to the state's petition for special action, Allin again asserts that her due process rights were violated because the victim's family's wishes were the

[3]We recognize that some may interpret a prosecutor's duty to consider the public's interest as thinly-disguised permission to engage in prosecutions solely for perceived political gain. *See* American Bar Association, *ABA Standards for Criminal Justice: Prosecution Function* Std. 3-3.9(d) (3d. ed. 1993) ("In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions."). Absent some vindictive purpose or prohibited classification, however, we find no basis to conclude such conduct, however distasteful, violates due process.

"deciding factor" prompting the state to withdraw the plea. The crux of her argument appears to be that the media coverage of the case was a result of conduct by the victim's family and, thus, the state's decision was, in substance, driven by the victim's family in violation of A.R.S. § 13-4419(C) and our supreme court's decisions in *State v. Lavers*, 168 Ariz. 376, 814 P.2d 333 (1991), and *State v. Wood*, 180 Ariz. 53, 881 P.2d 1158 (1994).

¶11 We reject this argument for several reasons. First, it is inconsistent with the respondent judge's ruling. The respondent expressly found the prosecutor's decision to withdraw the plea was not a result of the family's input, but instead was prompted by the media's inquiry into the case. Thus, the respondent rejected the factual basis required to support Allin's argument—that the family's input was the controlling factor in the state's decision to withdraw the plea.

¶12 Second, even assuming the respondent judge's finding that media attention drove the state's decision is fundamentally the same as a finding that decision was driven by the family's wishes because the family instigated the media attention, we question whether *Lavers* and *Wood* apply in this context. In *Lavers*, our supreme court addressed the defendant's claim that the state had "'abdicate[d] [its] governmental responsibility'" and violated the defendant's due process rights because the wishes of the victim's family were "'the deciding factor'" in the state's decision whether to seek the death penalty. 168 Ariz. at 396, 814 P.2d at 353. The court found the record did not support the defendant's assertion that the family's wishes were the deciding factor, concluding the state had not "placed any undue weight on the family's wishes." *Id.* at 397, 814 P.2d at 354. In *Wood*,

the court observed the state could not give "undue weight" to the wishes of the victim's family in determining whether to seek the death penalty, but again concluded the record did not support a claim that those wishes were the "controlling factor" in the state's decision to seek the death penalty. 180 Ariz. at 68, 881 P.2d at 1173. The court in *Wood* also noted the victim's family had "a constitutional and procedural *right* to confer with the state," regarding whether to seek the death penalty, but expressly declined to define the "breadth of that right." *Id.*

¶13 Thus, neither *Lavers* nor *Wood* hold the state necessarily is prohibited from treating the family's wishes as the dispositive factor in deciding whether to seek the death penalty—both cases rejected the defendant's factual assertion that those wishes were controlling without determining whether such consideration would constitute giving the family's wishes prohibited "undue weight." *But see Booth v. Maryland*, 482 U.S. 496, 508-09 (1987) (in capital sentencing, admission of victim's family members' characterizations and opinions about crime, defendant, and appropriate sentence violates Eighth Amendment), *overruled on other grounds by Payne v. Tennessee*, 501 U.S. 808 (1991).

¶14 Moreover, the due process concerns present in a capital case are of a different character than those presented by a non-capital prosecution and the procedures in a capital case are held to more exacting scrutiny. *See Lankford v. Idaho*, 500 U.S. 110, 125-27 (1991) (weighing "special importance of fair procedure in the capital sentencing context" and holding lack of notice to defendant of intent to seek death penalty violated due process); *Eddings v. Oklahoma*, 455 U.S. 104, 111, 113-15 (1982) (discussing

heightened protections in capital cases and reversing death sentence because sentencing judge did not consider all mitigating character evidence); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (noting Court's "often stated" principle "there is a significant constitutional difference between the death penalty and lesser punishments," and overturning death sentence because jury not instructed on lesser included noncapital offense); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (finding "the penalty of death is qualitatively different from a sentence of imprisonment," and holding mandatory death penalty statute unconstitutional). Allin has not identified, nor do we find, any authority applying *Lavers* and *Wood* outside the capital context. Thus, even if we agreed—in contrast with the respondent judge's factual finding—that the media attention to the case was solely a conduit for the victim's family's opinion and not an independent reason for the state to withdraw the plea, we conclude *Lavers* and *Wood* do not support the respondent's ruling that Allin's constitutional rights were violated.

¶15 Section 13-4419(C) states, "[t]he right of the victim to confer with the prosecuting attorney does not include the authority to direct the prosecution of the case." Assuming, without deciding, that § 13-4419(C) prohibits the state from deciding whether to withdraw a plea offer because of the victim's wishes,[4] the respondent judge's findings preclude a conclusion that occurred here. Again, the respondent found the media's

[4]It is at least equally likely the legislature intended § 13-4419(C) to make clear that a victim had no right to compel the state to proceed in a certain manner in a prosecution, not that the state, in the exercise of its discretion, could not give significant, even determinative, weight to the victim's wishes.

interest in the case, not the family's wishes, was the driving force behind the state's decision to withdraw the plea offer. Accordingly, § 13-4419(C) does not apply.

¶16 For the reasons stated above, we conclude the state's decision to withdraw the plea offer in these circumstances does not violate Allin's due process rights. We therefore vacate the respondent judge's order reinstating the state's plea offer.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge